United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 27, 2004

REVISED

TO : Roberto Chavarry, Regional Director
Region 13

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: DHL Danzas Air & Ocean 524-8393-0155
Case 13-CA-42041 524-8393-5088

This case was submitted for advice as to whether the Employer enforced its employee e-mail policy in a disparate manner by terminating an employee for sending an e-mail about her Union activities.

FACTS

Until her discharge on July 19, 2004,[1] Kathleen Brabac was an entry writer in the brokerage department of DHL Danzas Air & Ocean. She participated in a drive by Teamsters Local 705 to organize DHL employees by, among other things, attending Union meetings, signing a union authorization card and distributing Union literature to her co-workers.

On July 15, Brabac cleaned off her desk in a mistaken belief she was starting an off-site job assignment the next day. In fact, the Employer had not assigned Brabac that job. Noting her empty desk on July 16, supervisor Barbara Smith believe that Brabac had quit her employment with DHL because of the Employer's decision not to award her the job. Smith went into Brabac's e-mail system on her desktop computer, ostensibly to learn why Brabac had quit. Instead, Smith discovered an e-mail Brabac had recently sent to a former DHL employee, currently employed by a competitor firm, entitled "UNION – UNION – UNION." In it, Brabac stated that,

> management is scared now of the union coming into brokerage. We have a unanimous vote and they know it … We will see what happens tomorrow …

Smith immediately forwarded the e-mail message to two DHL managers. They concluded that Brabac had violated the Employer's prohibition on personal use of e-mail, which provides that "[the Employer's] computing resources are to be used for [the Employer's] business purposes. They are

[1] All dates are in 2004 unless specified otherwise.

not to be used for personal gain or entertainment." The Employer discharged Brabac the next work day for violation of this rule.

The Employer contends that it has a policy of "passive" enforcement of its e-mail rule, that is, it enforces the policy when it learns of an employee's use of e-mail for personal business. It recently discharged one employee and suspended another employee for sending a long series of sexually explicit e-mails to each other. In 2000, the Employer had orally warned Brabac herself for sending a long, chain e-mail to many of her co-workers. Brabac and two other DHL employees, however, state that employees routinely send to their co-workers, including supervisors, a variety of personal e-mails involving such things as jokes, football pools, chain letters, and basketball tournaments.

ACTION

We conclude that the Employer enforced its employee e-mail policy in a disparate manner by terminating an employee for sending an e-mail about her Union activities.

The Board has held that an Employer cannot lawfully prohibit employees from using e-mail for union business while allowing employees to send personal e-mail concerning a wide variety of non-union subjects.[2] Here, the Employer discharged Brabac for engaging in the protected, concerted act of sending a former co-worker an e-mail message stating that "we [that is, she and others] have a unanimous vote" in favor of union representation at DHL.[3] The evidence further establishes that the Employer routinely tolerates personal e-mails that do not involve union activity, despite its rule

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[2] E.I. Dupont, 311 NLRB 893, 919 (1993) (limiting employees' use of e-mail to distribute union information while permitting its use for distribution of other types of non-business related information was unlawful discrimination).

[3] Employee communication to third parties in an effort to obtain their support that relate to an ongoing dispute between employees and their employer is protected, so long as the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection. See Mountain Shadows Gold Resort, 330 NLRB 1238, 1240 (2000), aff'd upon remand 338 NLRB No. 73 (2002), enf'd sub nom. Jensen v. NLRB, 2004 WL 78160 (9th Cir. 2004). There is nothing in Brabac's e-mail to her former coworker that would cause Brabac to lose statutory protection.

prohibiting such use of its system.[4] Since, as the Region has concluded, all other aspects of a Wright-Line case have been met, we conclude that the Employer's disparate enforcement is unlawful here.

Accordingly, the Region should issue a Section 8(a)(3) complaint, absent settlement.

B.J.K.

[4] We conclude that the recent discharge and suspension of employees for sending sexually explicit emails are distinguishable from Brabac's discharge for sending a single, short e-mail concerning her union activity. Further, Brabac's mere oral warning for sending a series of lengthy chain e-mail letters to colleagues in 2000 further establishes the disparity of her discharge. Finally, it is apparent from the Employer's actions that the Employer permits personal use of e-mail except for those it deems inappropriate.